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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 809

UNITED STATES OF AMERICA *ex rel.* EVSEY S. PETRUSHANSKY a/k/a Peter Green, a fugitive from Justice of the United Mexican States,

Petitioner,

v.

ANTHONY R. MARASCO, United States Marshal for the Southern District of New York,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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ANTHONY R. MARASCO, United States Marshal for the Southern District of New York,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, Evsey S. Petrushansky, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on December 30, 1963.

Citations to Opinions Below

The opinion of the District Court discharging petitioner's writ of habeas corpus is printed in Appendix A hereto, and

is reported at 215, F. Supp. 935. The opinion of the Court of Appeals is printed in Appendix B hereto and is not officially reported.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on December 30, 1963. The jurisdiction of this court is invoked under 28 U.S.C. Section 1254(1).

Questions Presented

1. Whether a complaint which forms the basis for the issuance of a warrant of arrest is jurisdictionally defective if it fails to allege the time, place, victim and any of the details of the crime of murder?

2. Whether the failure to allege the basic facts involved in an alleged commission of the crime in such a complaint constitutes a deprivation of liberty without due process of law under the Fifth Amendment of the Constitution?

3. Whether evidence showing that the petitioner was without the jurisdiction of the demanding Country (Mexico) at the time the crime was allegedly committed, is admissible on a hearing under the Extradition Treaty of 1899 between the United States and Mexico?

Statutes Involved

1. Articles I, II, III, VIII and X of Extradition Treaty of 1899 between United States and United Mexican States—31 Stat. 1818.

2. Title 18 United States Code, Sec. 3184 and 3190.

The texts of these provisions are printed, *infra*, pages

Statement

The petitioner has been charged with the crime of murder by the United Mexican States, which demanded his extradition pursuant to Treaty of 1899 between United States and Mexico.

The petitioner was arrested and taken into federal custody at the request of the Mexican Government on October 5, 1962. The warrant of arrest was issued by Commissioner Gerrity of the Southern District of New York on October 3, 1962, on the basis of a complaint prepared by an Assistant United States Attorney, who had no knowledge of the facts. The complaint merely stated that petitioner was accused of murder and failed to specify the victim, the time and place, or any details of the crime.

Almost two months later, on December 3, 1962, an extradition hearing was initiated by Commissioner Bishop of the Southern District of New York and concluded in January, 1963. At the hearing, the Government offered the formal documents submitted by the Mexican Government and rested its case. Petitioner introduced evidence tending to show that he was not in Mexico at the time when two witnesses testified they had spoken to the murder victim. This testimony was excluded by Commissioner Bishop. On January 18, 1963, Commissioner Bishop found that: (1) petitioner was the person wanted by the United Mexico States; (2) that the offense charged was a crime, under both the laws of the State of New York and the United States of Mexico; (3) evidence was sufficient to establish probable cause to believe that the offense was committed by petitioner in Mexico and (4) petitioner was extraditable under the Treaty. Commissioner Bishop then remanded petitioner to the custody of the United States Marshal to await the order of the Secretary of State. Petitioner then obtained a writ of *habeas corpus* from District Court Judge Bonsal, of the Southern District of New

York, on which argument was held before Judge Noonan. Judge Noonan discharged the writ of habeas corpus, and on appeal to the Court of Appeals, Second Circuit, the judgment was affirmed.

Reasons for Granting the Writ

This case presents in a clear fact pattern a fundamental question involving the interpretation of Article X of the Treaty of 1899 between the United States and Mexico, as it may conflict with the American concepts of due process.

An Assistant United States Attorney, on the basis of a blanket request by a foreign government, without specification of any facts as to the commission of a crime of murder, prepared a sworn complaint to procure the issuance of a warrant of arrest for this petitioner, an American citizen.

If this judgment is permitted to stand, a United States Commissioner would have the right to have anyone arrested on a mere charge of commission of a crime, without any basic facts set forth in the affidavit or complaint annexed to the application to procure such warrant of arrest. If the position taken by the District and Circuit Courts is to prevail, then under Article X of the Treaty with Mexico, a Commissioner would be in a position to detain an American citizen for a period of forty days without anything more than a request by the foreign government, alluding to such citizen being charged with the commission of a crime in a foreign country.

The notice required under our due process clause has been completely ignored. Protection against arbitrary action is rendered impotent. The petitioner, an American citizen, is helpless to learn of the substance of the charge until the commencement of an extradition hearing.

It is submitted that this is contrary to our natural, inherent and basic principles of justice which have been

established for the protection of private rights. Any deprivation of such rights, by virtue of a Treaty, is beyond the lawful power of government. Allowing a person to be detained in jail on the uninformed statement of someone who has received no facts of a purported crime or any supporting papers by the Foreign Government, is a failure to observe that fundamental fairness indispensable to justice.

The Courts below have decided an important question of Federal Constitutional Law which has not been, but should be settled by this Court.

POINT I

The warrant of arrest herein was issued without a sufficient complaint and as a result is invalid in any proceedings based thereupon. It is void because of lack of jurisdiction over the person of the relator and the subject matter herein and constitutes a deprivation of liberty without due process of law.

A warrant issued without a sufficient complaint on oath is invalid. *Ex parte McCabe*, 46 F. 363, LRA 589.

The complaint failed to set forth the source of the petitioner's knowledge to make complaint, merely stating that he is informed through diplomatic channels. Nowhere does it appear what actual documents or written or oral communications this knowledge was based upon, other than a formal request.

Yordi v. *Nolte*, 30 S. Ct. 90, 215 U. S. 232.

In *Fernandez* v. *Phillips*, 268 U. S. 311, a copy of the proceedings in the Mexican Court and many pages of evidence were appended to the request for extradition, while in this case, there is a mere request by the Mexican Government to detain the petitioner.

In ex Parte Sternaman, 77 Fed. 595 (N.D.N.Y. 1896), aff'd *sub nom. Sternaman* v. *Peck*, 80 Fed. 883 (C.C.A. 2, 1897), relied upon along with *Fernandez* case in the District and Circuit Court decisions, the sufficiency of the complaint was discussed, and the Court held, that even though the complaint was inartistically drawn, it sufficiently complained of the nature of the charge. It set forth the time, the place and the victim. This is clearly distinguishable from the instant case.

There is a complete failure in the complaint to specify anything about the crime allegedly charged, to wit, murder. It does not fully inform the petitioner of the nature of the charge.

Yordi v. *Nolte*, 30 S. Ct. 90, 215 U. S. 232;
In re Roth, 15 F. 506.

A complaint praying for the issuing of a warrant in a foreign extradition case must be as specific as in case of an offense committed in the United States. It should clearly set forth the substance of the offense charged in order to let the court see that a crime has been committed for which such a warrant can properly be granted. *In re Farez*, Fed. Cas. No. 4644, 7 Blatchf. 34, 7 Abb. Prac. N. S., 84.

Any proceedings conducted on the basis of this defective complaint are invalid, as the court never acquired jurisdiction over petitioner.

This petitioner should have been accorded minimal safeguards as to his liberty and such facts should have been set forth which would have reasonably apprised him of the charges asserted by Mexico. The Commissioner should not have issued the warrant of arrest on the basis of an insufficient complaint submitted by the Assistant U. S. Attorney.

Behind the cloak of Article X of the Treaty, the Government attempts to justify this overt deprivation of due process. It is submitted that this abuse was never intended by the treaty signatories for the United States or Mexico. If construed otherwise, it would then be in conflict with the fundamental constitutional protections afforded to our citizens and thus beyond the pale of the United States Government to contract away.

The intent and application of the due process clause and the treaty are very much at issue in this case.

POINT II

The petitioner should have been allowed to introduce evidence showing that he was not in the jurisdiction of Mexico at the time of the alleged commission of the crime.

Petitioner submits that it was proper to offer into evidence and to receive the Braniff Airline Manifest and Eastern Airlines tickets as well as the testimony of Messrs. Cobe and Sauve to prove that the relator was not in the jurisdiction of the State of Mexico at the time that any crime is alleged to have been committed.

Petitioner should have been permitted to present evidence to explain the evidence produced against him or otherwise to establish want of probable cause.

Collins v. *Loesel*, 259 U. S. 309.

Although the general rule that proof of an alibi or absence from the scene of the crime at the time of its commission will not warrant the discharge of person sought to be extradited, it is admissible to show that such proof negatives the presence of the relator within the demanding state. In this case it is contended that petitioner was

completely out of the country of Mexico at the time alleged crime could have been committed.

Hyatt v. *Cochran*, 188 U. S. 691;
Munsy v. *Clough*, 196 U. S. 364.

It was incumbent on the part of the Government to prove petitioner was in Mexico at the time of the alleged commission of the crime. This is a jurisdictional fact which petitioner negatived by the testimony and documentary evidence offered. As the jurisdiction of Mexico was being attacked, the proffered evidence should have been received.

CONCLUSION

It is therefore respectfully prayed that this petition for a writ of certiorari be granted.

Respectfully submitted.

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Opinion and Decision of United States Court of Appeals.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 80—September Term, 1963.

(Argued October 17, 1963 Decided December 30, 1963.)

Docket No. 28232

UNITED STATES OF AMERICA ex rel. EVSEY S. PETRUSHANSKY, a/k/a PETER GREEN, a fugitive from Justice of the United Mexican States,

Relator-Appellant.

—v.—

ANTHONY R. MARASCO, United States Marshal for the Southern District of New York,

Respondent-Appellee.

Before:

MEDINA, HAYS and MARSHALL,

Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York, Gregory F. Noonan, *Judge*, discharging a writ of habeas corpus. Opinion below reported at 215 F. Supp. 953. Affirmed.

EDWIN GOLD, Jamaica, New York (Gold, Lazar & Cooper, on the brief), *for Relator-Appellant.*

Opinion and Decision of United States Court of Appeals:

VICTOR TEMKIN, Asst. United States Attorney (Robert M. Morgenthau, United States Attorney for the Southern District of New York, on the brief) (Andrew T. McEvoy, Jr., and Robert J. Geniesse, Assistant United States Attorneys, of counsel), *for Respondent-Appellee.*

MARSHALL, *Circuit Judge*:

Evsey S. Petrushansky, relator-appellant herein, has been charged with the crime of murder by the United Mexican States, which demanded his extradition in accordance with the Treaty of 1899 between the United States and Mexico. 31 Stat. 1818. A complaint charging him with murder in Mexico was filed with Commissioner Gerrity of the Southern District of New York on October 5, 1962 and a warrant for his arrest issued thereon. Pursuant to 18 U. S. C. § 3184, he was brought before Commissioner Bishopp for a hearing on December 3, 1962. After hearings on five dates in December 1962 and January 1963, the Commissioner found that Petrushansky was the person sought by the Mexican government, that the crime charged was an offense under the laws of both sovereignties and was extraditable under the treaty and that the evidence presented at the hearing, consisting of documents furnished by Mexico, was sufficient to establish probable cause to believe that Petrushansky committed the offense in that country. He remanded the fugitive to the custody of the United States Marshal to await the order of the Secretary of State. Relator then obtained a writ of habeas corpus from Judge Bonsal, on which argument was held before Judge Noonan. This appeal is taken from Judge Noonan's order discharging the writ.

Opinion and Decision of United States Court of Appeals.

Appellant argues here the same points which he raised before Judge Noonan. He claims first that the warrant for his arrest was invalid, because the complaint on which it was based was made by an Assistant United States Attorney having no personal knowledge of the facts and because it failed to specify any of the details of the crime charged. Second, he asserts that the evidence before the Commissioner was inadequate to establish probable cause that any extraditable crime was committed or that he was in any way connected with the crime. Finally, he alleges that the Commissioner erred in excluding proffered testimony that the supposed victim was alive at a time when the fugitive had already left the jurisdiction of Mexico. We shall discuss these points *seriatim*.

The authority of an Assistant United States Attorney to institute proceedings pursuant to a request for extradition was confirmed, as Judge Noonan explained, in *Fernandez v. Phillips*, 268 U. S. 311 (1925), which is controlling here. The fact that the complainant lacked personal knowledge of the facts is thus irrelevant. Appellant's position regarding the sufficiency of the complaint itself seems stronger, since it is limited to a statement that he is accused of murder and does not specify either the victim, the time and place, or the details. However, under Article X of the Treaty, each government is obligated, upon being notified by the other that it has issued a warrant of arrest, to procure the provisional arrest of fugitives and to detain them until supporting papers are received. This language appears to contemplate the issuance of warrants based on no more information than was provided here. Cf. *Ex Parte Dinehart*, 188 F. 858 (C. C. S. D. N. Y. 1911), where the court held that a complaint which, like this one, merely charged the offense of murder without supporting details, was sufficient to give the Commissioner jurisdiction to issue a warrant and conduct an evidentiary hearing.

Furthermore, no prejudice to the appellant appears to have resulted from the failure to set forth the details of the crime more clearly, since his counsel was fully acquainted with the evidence at the time of the hearing and was prepared to establish an alibi. Thus the appellant's attacks on the Commissioner's jurisdiction are unfounded. Cf. *Fordi* v. *Nolte*, 215 U. S. 227 (1909); *Ex parte Sternaman*, 77 Fed. 595 (N. D. N. Y. 1896), aff'd *sub nom. Sternaman* v. *Peck*, 80 Fed. 883 (C. C. A. 2, 1897).

Passing now to the sufficiency of the evidence adduced at the hearing to justify appellant's detention, it is necessary to deal with several points. First, appellant claims that the evidence was deficient for failure to include an authenticated copy of the Mexican law under which he is charged. This is required under Article VIII of the Treaty, but only with regard to those offenses in which it is specified in Article II that surrender shall depend on the fact of the crime being punishable under the laws of both parties. However, the proviso plainly applies only to the crimes of embezzlement from private persons, obtaining property by extortion or false pretenses, and attempts to commit the enumerated crimes, not to murder and the other crimes mentioned in Article II. Second, appellant relies on Article XIX of the Mexican Constitution, which states that no one may be detained for longer than three days unless a formal complaint showing the time, place and details is provided him. This provision of Mexican internal law is of course primarily for the courts of that country to interpret; our duty would seem limited to ensuring that the applicable provisions of the treaty and the governing American statutes are complied with. In any event, the record discloses a complete statement by the presiding judge who issued the order of arrest, of the circumstances of the crime and the presumptive responsibility of the four men, including appellant herein, charged with it (Gov't Ex. 2, 197-221). This

would seem to satisfy the constitutional requirements of that country.

The next question is whether the documentary evidence, properly authenticated in accordance with 18 U. S. C. § 3190, was sufficient to justify the Commissioner's finding of probable cause. Appellant claims that it is insufficient to establish either the fact of a crime within the jurisdiction of Mexico, or his participation in any crime. His argument on the first point is rather frivolous. On November 18, 1961, two Mexican highway patrolmen noticed blood-stained men's clothing lying by the side of the Mexico-Acapulco highway, in a district called Segundo Cantil. On inspection, personal effects apparently belonging to one Louis M. Vidal, Jr., of New York City, were also found, together with a key to Room 908 of the Continental Hilton Hotel in Mexico City, in which Mr. Vidal had stayed on the night of November 11. On November 22, other police officers discovered a corpse buried by the side of the road, three kilometers from the location of the clothing. The corpse was riddled with four bullet wounds in the head and neck regions. It was later identified by Mrs. Teresa Vidal as the body of her husband, Louis M. Vidal, Jr. who had arrived in Mexico City from New York on November 11. If there are other explanations for the death than murder in Mexico, they are not readily apparent.

The evidence connecting Petrushansky with the alleged murder, if not quite as compelling as the evidence of murder itself, was certainly sufficient to establish a finding of probable cause. The record before the Commissioner included a deposition of Luis deGaray Jaimes, a Mexican citizen who is one of the four men accused by the Mexican authorities of the murder, which relates that he met Vidal when the latter arrived in Mexico by air from New York on November 11. DeGaray was accompanied by one Joel David Kaplan, an American also accused of the murder,

who was an officer of the New York company which controlled the Mexican firm for which he worked. Kaplan had arrived from San Antonio on November 9, together with two other men later identified as Petrushansky and one Harry Kopelson, alias Earl Scott, who is the fourth man charged with the murder. All three took rooms at the El Diplomatico Hotel, on the same floor. Some weeks before, according to deGaray's deposition, Kaplan had told him at a meeting in Houston, Texas, that he intended to come to Mexico with his partner (Vidal) and two other persons in connection with a business venture, and that the partner "was a very dangerous individual, with whom he had had serious differences in the past, and he had been informed through other channels that he planned to eliminate him; for this reason, he thought that the day was not far off where either of them would do it, that is to say, commit a murder between themselves."

On Friday, November 10, Kaplan asked deGaray to get him a car for use on the business trip which he planned to make. After meeting Vidal on Saturday, November 11, Kaplan and deGaray took him to the Continental Hilton Hotel, where Vidal checked in. Later that afternoon, deGaray brought a 1953 Buick owned by his uncle to Kaplan at the El Diplomatico, in accordance with the latter's request. According to deGaray's deposition, he then went to his office and stayed there during the evening, falling asleep on a sofa.[1] He was awakened at 2:40 on Sunday morning by a telephone call from Kaplan, who told him that the loaned car had broken down and that he should pick it up that morning. When deGaray picked up the car, he saw

[1] This part of deGaray's deposition is contradicted by statements of the watchman and elevator operator of the building where he worked, which indicate that none of the offices were occupied after midnight.

holes in the window and blood stains on the front seat and door. Later that morning, he met Kaplan and asked him about the meaning of the blood stains; Kaplan answered that "it is not possible, I did wash them off myself" and refused further explanation. DeGaray later washed some of the blood stains from the Buick. He did not see Kaplan, Vidal or the other two men again.

Other depositions in the record are those of employees at the Continental Hilton, who state that Vidal was checked out about midnight on Sunday night by Kaplan and his luggage placed in a 1961 Corvair; by employees of the El Diplomatico Hotel, which indicate that Scott, Petrushansky and Kaplan were in and out of their rooms on Saturday night and, when they appeared, seemed to be nervous and high-strung. In addition, it appears in the record that a valise containing clothing belonging to Vidal was discovered on November 16 in the trunk of a blue Corvair which had been rented by Petrushansky on the early morning of Monday, November 13. He had taken that car in lieu of another, rented Sunday night, which he claimed was mechanically defective. The deposition of Nancy Hernandez, an employee of the rental agency, states that she found the car parked illegally at the airport on Tuesday, November 14, and removed it to the company's main lot. Later on that day, Petrushansky came to the Hertz office at the airport and asked Miss Hernandez about the car he had rented. When told it had been found at the airport, he expressed surprise, saying he had left it the night before on the lot of the Diplomatico Hotel and that it had disappeared. However, he had the key. Petrushansky then paid the bill for the rental, and then asked if anything had been found in it, to which she responded in the negative. Petrushansky appeared nervous and troubled during the entire interview.

The last major item in the record is a deposition of Kaplan. He states that he came to Mexico to assist in some business negotiations between Petrushansky and Vidal, both of whom he knew, and met Scott only on November 9 in San Antonio when Petrushansky joined him. His story of their movements in Mexico up to the evening of November 11 generally accords with deGaray's deposition. The deposition continues that he went with Petrushansky and Scott to pick up Vidal at the Hilton in the late evening, driving in the borrowed Buick. They dropped him (Kaplan) off at a bar near the Diplomatico, and continued on their way. Petrushansky and Scott then returned about 3 a.m. and told him that "Vidal had not fulfilled his part of the deal and Scott had killed him." Scott was armed with a .38 caliber revolver. (A cartridge clip for .38 caliber bullets was found by police on the floor of the Buick.) Kaplan denied knowing where Vidal was buried. He let Petrushansky and Scott off at the hotel, tried to clean out the blood stains and then called deGaray. Kaplan states that he told deGaray that Scott had killed Vidal. When Petrushansky and Scott awakened on Sunday afternoon, the three agreed to pick up Vidal's belongings at the Hilton Hotel, which they did on Sunday night. Kaplan checked out Vidal and placed his suitcase in the trunk of the car Petrushansky had rented. Kaplan was then left at the Diplomatico and Vidal's belongings were disposed of in a way not known to him.

On the basis of the evidence summarized in the preceding paragraphs, ample justification exists for holding Petrushansky to answer the charge of Vidal's murder. To be sure, the actual shooting, insofar as anything is known about it, appears to have been done by Scott, but Petrushansky is directly implicated in a number of ways. The appellant relies strongly on one item in the record not previously mentioned, a police laboratory report dated December 2,

1961 which states that the blood scrapings taken from the Buick were twelve to fifteen days old. On the basis of this, he argues that the crime could have been committed no earlier than November 17, at which time he had already left Mexico. The report does not state specifically that the test was made on the date mentioned. Even if it were, however, it would hardly be proper to give so much weight to this far from precise report to the exclusion of all the other evidence in the case. Nor does the fact that the dirt found in and about the car was of a different color from the dirt found in the vicinity of the grave, as shown by the laboratory report, have much weight to counter the case built up in many other ways.

Finally, appellant complains of the Commissioner's exclusion of that testimony of two persons who claimed to have spoken with Vidal over the telephone on November 14. There is no force in this contention. Although at a hearing of this type, the fugitive has a right to introduce evidence, the right is limited to testimony which explains rather than contradicts the demanding country's proof, and its precise scope is largely in the Commissioner's discretion. See *Collins* v. *Loisel*, 259 U. S. 309 (1922); *Charlton* v. *Kelly*, 229 U. S. 447 (1913); *Desmond* v. *Eggers*, 18 F. 2d 503 (9 Cir.), motion to stay execution denied, 274 U. S. 722 (1927). Except for the ambiguous laboratory report mentioned above, the evidence all points to the murder being committed in the early morning hours of November 12, 1961. Under the circumstances, there was no error in excluding the proffered testimony.

Since the warrant was properly issued, the offense charged was within the Treaty provisions, the appellant is the fugitive demanded by the Mexican government, evidence sufficient for a finding of probable cause was furnished, and no error was committed at the hearing, no ground for issuance of the writ of habeas corpus existed. Accordingly, the judgment is affirmed.

Opinion by Noonan, D. J.

(159) NOONAN, D. J.:

This is a proceeding on a writ of habeas corpus to test the validity of the detention of one, Evsey S. Petrushansky, presently in the custody of the United States (160) Marshal for the Southern District of New York.

On October 3, 1962 extradition proceedings were initiated at the request of the United Mexican States pursuant to a Treaty of Extradition proclaimed on April 22, 1899, 31 Stat. 1818 between Mexico and the United States. A formal complaint was issued on that date and filed with the United States Commissioner for the Southern District of New York by an Assistant United States Attorney acting on behalf of the United Mexican States.

Said complaint charged the relator, Evsey S. Petrushansky alias Peter Green, with the commission of the crime of murder, within the United Mexican States. A warrant of arrest was issued on the same date pursuant to Title 18 United States Code § 3184, and a detainer was lodged with the Warden of the New York City Jail, where the fugitive was then incarcerated on a charge of possession of obscene matter.

Upon the fugitive's release from the custody of the State on October 5, 1962, he was placed in Federal detention pending the determination of the instant hearing and was arraigned before the United States Commissioner, John B. Garrity, upon the aforementioned complaint.

(161) At the time of said arraignment Petrushansky was represented by counsel who have continually represented him at all proceedings before the Commissioner.

Within the 40 days provided by Article X of the aforementioned treaty the documents in support of extradition were filed with the Commissioner on behalf of the United Mexican States as well as requests from the United Mexican States to the State Department of the United States seeking the fugitive's extradition.

Hearings were commenced on December 3, 1962 and continued on December 6, 1962, January 11, 1963, January 15, 1963 and January 18, 1963, before Commissioner Bishopp.

On January 18, 1963, Commissioner Bishopp ruled, (1) that Evsey S. Petrushansky is the person wanted by the United Mexican States; (2) that the offense charged is a crime under the laws of Mexico and is also punishable under the laws of the State of New York; (3) that the evidence is sufficient to establish probable cause to believe that the offense charged was committed by Petrushansky in Mexico; and (4) that the fugitive is extraditable under the applicable treaty. He then remanded Petrushansky to the United States Marshal for the Southern District of New York to await the order of the Secretary of State of the United States.

(162) Said order has been delayed by the proceedings now before this court.

I. *Statute and Treaty Involved*

Title 18, United States Code, Section 3184.

§ 3184. Fugitives from foreign country to United States.

"Whenever there is a treaty or convention for extradition between the United States and any foreign government, any justice or judge of the United States, or any commissioner authorized so to do by a court of the United States, or any judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within his jurisdiction, with having committed within the jurisdiction, of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or commissioner, to the end that the

evidence of criminality may be heard and considered. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made."

(163) Title 18, United States Code, Section 3190.

§ 3190. Evidence on hearing.

"Depositions, warrants, or other papers or copies thereof offered in evidence upon the hearing of any extradition case shall be received and admitted as evidence on such hearing for all the purposes of such hearing if they shall be properly and legally authenticated so as to entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused party shall have escaped, and the certificate of the principal diplomatic or consular officer of the United States resident in such foreign country shall be proof that the same, so offered, are authenticated in the manner required."

Treaty of Extradition between the United States of America and the United Mexican States proclaimed April 22, 1899.

ARTICLE I

"The Government of the United States of America and the Government of the United States of Mexico

mutually agree to deliver up persons who, having been charged with or convicted of any of the crimes and offenses specified in the following article, committed within the jurisdiction of one of the contracting parties, shall seek an asylum or be found within the territory of the other.

ARTICLE II

Persons shall be delivered up, according to the provisions of this convention, who shall have been charged with, or convicted of, any of the following crimes or offenses:

(164) 1. Murder, comprehending the crimes known as parricide, assassination, poisoning and infanticide. * * *"

ARTICLE III

"Extradition shall not take place in any of the following cases:

1. When the evidence of criminality presented by the demanding party would not justify, according to the laws of the place where the fugitive or person so charged shall be found, his or her apprehension and commitment for trial, if the crime or offense had been there committed. * * *"

ARTICLE VIII

"Requisitions for the surrender of fugitives from justice, under this present convention, shall be made by the respective diplomatic agents of the contracting parties, or, in the event of the absence of these from the country or from its seat of government, they may be made by superior consular officers.

If a person whose extradition is asked for shall have been convicted of a crime or offense, a copy

of the sentence of the court in which he was convicted, authenticated under its seal, with attestation of the official character of the Judge by the proper executive authority, and of the latter by the minister or consul of the respective contracting party, shall accompany the requisition.

When, however, the fugitive shall have been merely charged with a crime or offense, a similarly authenticated and attested copy of the warrant for his arrest in the country where the crime or offense is charged to have been committed, and of the depositions upon which such warrant may have been issued, must accompany the requisition of as aforesaid.

(165) Whenever, in the schedule of crimes and offenses of article 2nd, it is provided that surrender shall depend on the fact of the crime or offense charged being punishable by imprisonment or other corporal punishment according to the laws of both contracting parties, the party making the demand for extradition shall furnish, in addition to the documents above stipulated, an authenticated copy of the law of the demanding country defining the crime or offense and prescribing a penalty therefor.

The formalities being fulfilled, the proper executive authority of the United States of America, or of the United Mexican States, as the case may be, shall then cause the apprehension of the fugitive, in order that he or she may be brought before the proper judicial authority for examination. If it should then be decided that, according to the law and the evidence, the extradition is due pursuant to the terms of this convention, the fugitive may be given up according to the forms of law prescribed in such cases."

ARTICLE X

"On being informed by telegraph or otherwise, through the diplomatic channel, that a warrant has been issued by competent authority for the arrest of a fugitive criminal charged with any of the crimes enumerated in the foregoing articles of this treaty, and on being assured from the same source that a requisition for the surrender of such criminal is about to be made accompanied by such warrant and duly authenticated depositions or copies thereof in support of the charge, each government shall endeavor to procure the provisional arrest of such criminal and to keep him in safe custody for such time as may be practicable, not exceeding forty days, to await the production of the documents upon which the claim for extradition is founded."

(166) The scope of inquiry by this court on this habeas corpus proceeding is narrowly circumscribed. As the Supreme Court has stated, in *Ornelas* v. *Ruiz*, 161 U. S. 502, at pages 508-509:

"By repeated decisions of this court it is settled that a writ of habeas corpus cannot perform the office of a writ of error, and that, in extradition proceedings, if the committing magistrate has jurisdiction of the subject matter and of the accused, and the offense charged is within the terms of the treaty of extradition, and the magistrate, in arriving at a decision to hold the accused, has before him competent legal evidence on which to exercise his judgment as to whether the facts are sufficient to establish the criminality of the accused for the purposes of extradition, such decision cannot be reviewed on habeas corpus. * * * Whether an extraditable crime has been committed

is a question of mixed law and fact, but chiefly of fact, and the judgment of the magistrate rendered in good faith on legal evidence that the accused is guilty of the act charged, and that it constitutes an extraditable crime, cannot be reviewed on the weight of the evidence, and is final for the purposes of the preliminary examination, unless palpably erroneous in law."

See also, *Gallina* v. *Fraser*, 177 F. Supp. 856, wherein the scope of review has been clearly outlined by Judge Smith.

At the outset this court notes that there has been no issue raised as to valid existence of the Treaty of Extradition as between Mexico and the United States. (167) Likewise, there is no question that Evsey Petrushansky, the relator, is the person sought by the demanding nation.

Relator in urging that the writ of habeas corpus be sustained bases his position on several grounds.

The relator contends the warrant issued for his arrest was invalid; hence, the Commissioner had no jurisdiction over his person, because it was based on a complaint insufficient on its face, and filed by an Assistant United States Attorney whose knowledge of the crime was gained through hearsay—to wit, diplomatic channels.

The complaint upon which the Extradition Warrant was issued states that the Assistant United States Attorney having been informed through diplomatic channels was acting for and in behalf of the Government of the United Mexican States. It charges the relator with having committed murder within Mexico and requests that he be provisionally arrested in accordance with Article X of said Extradition Treaty. Article X quoted above provides that a person wanted by a contracting party to the treaty may be held for at least forty days to await the production of the documents upon which extradition is

founded. Such papers and documents were filed within that time limit requesting the extradition of petitioner (168) and informing the Secretary of State that a warrant for the relator's arrest was issued in Mexico on December 22, 1961. At the hearings held before the Commissioner said documents were admitted into evidence.

The question of whether an Assistant United States Attorney is a proper party to initiate such proceedings along with the question of whether his knowledge gained through diplomatic channels is a sufficient basis to support a complaint has long been settled in the affirmative by the Supreme Court. In *Fernandez* v. *Phillips*, 268 U. S. 311, it stated, at page 312:

> "It is objected in the first place that the complaint and warrant are defective. The complaint was filed by an Assistant District Attorney of the United States for the District of New Hampshire. It alleged that the complainant was informed 'through diplomatic channel' that the appellant was duly and legally charged by the United States of Mexico with the crime, and on behalf of that government prayed the arrest. Of course whatever form of words was used, the complaint necessarily was upon information, but as appeared at the hearing it was filed by order of the Attorney General, upon request of the Secretary of State, enclosing a request for extradition from the Mexican Government and a copy of proceedings in a Mexican Court finding that the crime was duly proved against the appellant and ordering his arrest, many pages of evidence being appended. This was enough."

See also, Ex parte *Vordi*, 166 F. 924.

(169) Relator further contends that the complaint was devoid of sufficient details of the crime to authorize a warrant of arrest to issue. It is his position that in order for

one to be extradited for the crime of murder the complaint in question must set forth in detail the elements of the crime as found in Sec. 1041 of the Penal Law of New York and the required information as found in Article XIX of the Constitution of Mexico. While it is true the complaint in question here charges the crime of murder without any specific details, this court feels that any insufficiency in detail was amply satisfied at the extended hearings held before the Commissioner. There can be no question in the mind of this court that the relator, represented as he was by competent counsel, was in any sense in doubt as to the nature and details of the crime charged. As the Supreme Court stated in *Yordi v. Nolte*, 215 U. S. at page 232:

> "We think the evidence produced at the hearing justified the detention of the accused and corrected any irregularity in the complaint. As this court said in Nashimura Ekiu v. United States, 142 U. S. 651, 662: 'A writ of habeas corpus is not like an action to recover damages for an unlawful arrest or commitment, but its object is to ascertain whether the prisoner can lawfully be detained in custody; and if (170) sufficient ground for his detention by the Government is shown, he is not to be discharged for defects in the original arrest or commitment.'"

See also *Ex parte Sternaman*, 77 Fed. 595, at page 598:

> "That the petitioner was fully informed of the charge against her is beyond dispute. She appeared with counsel and the long investigation was concluded without objection that the complaint failed in particularity. The case of In re Adutt, 55 Fed. 376, is authority for the proposition that in such cases the commissioner may, upon objection by the defendant, make the complaint more definite and certain. 'That is,' says the

court, 'a matter for the commissioner acting within his jurisdiction, and not a matter going to the jurisdiction of the commissioner to entertain the complaint.' "

It is, therefore, the opinion of this court that the warrant of arrest was properly issued and that the Commissioner had obtained proper jurisdiction of the relator for purposes of extradition. Likewise from the hearings held before him, the Commissioner could properly determine from the testimony therein, that the crime of murder is an offense under the laws of Mexico and is punishable under the laws of the State of New York, any inadequacy of information in the complaint notwithstanding.

We now come to the question of whether there was competent and legal evidence presented before the (174) Commissioner to substantiate his holding that probable cause exists to extradite the relator for the crime charged. Contrary to the opinion expressed by the relator this court believes ample evidence was presented to substantiate the commissioner's finding.

The affidavit of Joel David Kaplan clearly implicates the relator with the murder of Louis M. Vidal, Jr. This statement together with the statements of Louis de Garay, Jaimes and the hotel workers, when read in conjunction with the various police records, present a sound basis of competent and legal evidence upon which the Commissioner could act. It has long been the law that the evidence necessary to hold one for extradition need not be of the same quality as that necessary for a trial on the merits. Indeed in *Glucksman* v. *Henkel*, 221 U. S. 508 (1911), Mr. Justice Holmes stated at page 512:

> "It is common in extradition cases to attempt to bring to bear all the factitious niceties of a criminal trial at common law. But it is a waste of time. For while of course a man is not to be sent from the country merely

upon demand or surmise, yet if there is presented, even in somewhat untechnical form according to our ideas, such reasonable ground to suppose him guilty as to make it proper that he should be tried, good faith to the demanding government requires his surrender (172). Grin v. Shine, 187 U. S. 181, 184; See Pierce v. Creecy, 210 U. S. 387, 405. We are bound by the existence of an extradition treaty to assume that the trial will be fair. The evidence in this case seems to us sufficient to require us to affirm the judgment of the Circuit Court."

The relator further contends that the Commissioner was in error when he refused to admit into evidence certain documents and testimony which the relator claims would have shown that he was not in Mexico on the date of the murder.

Extradition hearings as was pointed out above are not to be considered trials. It is not the duty of the Commissioner to try the issues. Rather it is his function to determine whether probable cause exists to hold the accused for extradition on the crime charged by the demanding nation. In *Charlton* v. *Kelly*, 229 U. S. 447, the court said at page 461:

"There is not and cannot well be any uniform rule determining how far an examining magistrate should hear the witnesses produced by an accused person. The proceeding is not a trial. The issue is confined to the single question of whether the evidence for the State makes a prima facie case of guilt sufficient to make it proper to hold the party for trial. Such committing trials, if they may be called trials in any legal sense, are usually regulated by local statutes. Neither can the courts be expected to bring about uniformity of practice as to the right of such an accused person to

(173) have his witnesses examined, since if they are heard, that is the end of the matter, as the ruling cannot be reversed. In this case, the magistrate refused to hear evidence of insanity. It is claimed that because he excluded such evidence, the judgment committing appellant for extradition is to be set aside as a nullity, and the accused set at liberty. At most the exclusion was error not reviewable by habeas corpus."

The avenues of relief open to an accused in an extradition proceeding are indeed narrow. *The First National City Bank of New York* v. *Aristequita*, 287 F. 2d 219 (2 Cir. 1960), at page 226, said:

"The defenses available to the fugitive are extremely limited: he cannot for example, introduce evidence which contradicts the demanding country's proof (Collins v. Loisel, 1922, 259 U. S. 309, 42 S. Ct. 469, 66 L. Ed. 956; *Charlton* v. *Kelly*, 1913, 229 U. S. 447, 33 S. Ct. 945, 57 L. Ed. 1274); evidence to establish alibi (Desmond v. Eggers, 9 Cir. 1927, 18 F. 2d 503, motion to stay execution denied 274 U. S. 722, 47, S. Ct. 657, 71 L. Ed. 1341; In re Wadge, D. C. 1883, 15 F. 864) . . . the actual guilt of the fugitive does not have to be established, but instead the demanding country need show only probable cause that he is guilty."

Accordingly, this court finds that the Commissioner did not abuse his discretion in excluding the documents and testimony proffered by the relator.

The court hereby orders the writ to be discharged.

So ordered.

Dated, New York, N. Y., April 5th, 1963.

G. F. Noonan,
U. S. D. J.

Treaty Provisions and Statutes Involved.

Treaty with the United Mexican States on Extradition. February 22, 1899, 31 Stat. 1818.

ARTICLE I

The Government of the United States of America and the Government of the United States of Mexico mutually agree to deliver up persons who, having been charged with or convicted of any of the crimes and offenses specified in the following article, committed within the jurisdiction of one of the contracting parties, shall seek an asylum or be found within the territory of the other.

ARTICLE II

Persons shall be delivered up, according to the provisions of this convention, who shall have been charged with, or convicted of, any of the following crimes or offenses:

1. Murder, comprehending the crimes known as parricide, assassination, poisoning and infanticide.

* * * * * * *

ARTICLE III

Extradition shall not take place in any of the following cases:

1. When the evidence of criminality presented by the demanding party would not justify, according to the laws of the place where the fugitive or person so charged shall be found, his or her apprehension and commitment for trial, if the crime or offense had been there committed.

* * * *

Treaty Provisions and Statutes Involved.

ARTICLE VIII

Requisitions for the surrender of fugitives from justice, under the present convention, shall be made by the respective diplomatic agents of the contracting parties, or, in the event of the absence of these from the country or from its seat of government, they may be made by superior consular officers.

If a person whose extradition is asked for shall have been convicted of a crime or offense, a copy of the sentence of the court in which he was convicted, authenticated under its seal, with attestation of the official character of the Judge by the proper executive authority, and of the latter by the minister or consul of the respective contracting party, shall accompany the requisition.

When, however, the fugitive shall have been merely charged with a crime or offense, a similarly authenticated and attested copy of the warrant for his arrest in the country where the crime or offense is charged to have been committed, and of the depositions upon which such warrant may have been issued, must accompany the requisition of as aforesaid.

Whenever, in the schedule of crimes and offenses of article 2nd, it is provided that surrender shall depend on the fact of the crime or offense charged being punishable by imprisonment or other corporal punishment according to the laws of both contracting parties, the party making the demand for extradition shall furnish, in addition to the documents above stipulated, an authenticated copy of the law of the demanding country defining the crime or offense, and prescribing a penalty therefor.

The formalities being fulfilled, the proper executive authority of the United States of America, or of the United Mexican States, as the case may be, shall then cause the apprehension of the fugitive, in

order that he or she may be brought before the proper judicial authority for examination. If it should then be decided that, according to the law and the evidence, the extradition is due pursuant to the terms of this convention, the fugitive may be given up according to the forms of law prescribed in such cases.

ARTICLE X

On being informed by telegraph or otherwise, through the diplomatic channel, that a warrant has been issued by competent authority for the arrest of a fugitive criminal charged with any of the crimes enumerated in the foregoing articles of this treaty, and on being assured from the same source that a requisition for the surrender of such criminal is about to be made accompanied by such warrant and duly authenticated depositions or copies thereof in support of the charge, each government shall endeavor to procure the provisional arrest of such criminal and to keep him in safe custody for such time as may be practicable, not exceeding forty days, to await the production of the documents upon which the claim for extradition is founded.

Title 18, United States Code, Section 3184.

§3184. *Fugitives from foreign country to United States*

Whenever there is a treaty or convention for extradition between the United States and any foreign government, any justice or judge of the United States, or any commissioner authorized so to do by a court of the United States, or any judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any per-

son found within his jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or commissioner, to the end that the evidence of criminality may be heard and considered. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made. (June 25, 1948, ch. 645, 62 Stat. 822).

Title 18, United States Code, Section 3190.

§3190. *Evidence on hearing.*

Depositions, warrants, or other papers or copies thereof offered in evidence upon the hearing of any extradition case shall be received and admitted as evidence on such hearing for all the purposes of such hearing if they shall be properly and legally authenticated so as to entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused party shall have escaped, and the certificate of the principal diplomatic or consular officer of the United States resident in such foreign country shall be proof that the same, so offered, are authenticated in the manner required. (June 25, 1948, ch. 645, 62 Stat. 824).

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 809

UNITED STATES OF AMERICA, EX REL. EVSEY S. PETRUSHANSKY A/K/A PETER GREEN, A FUGITIVE FROM JUSTICE OF THE UNITED MEXICAN STATES, PETITIONER

v.

ANTHONY R. MARASCO, UNITED STATES MARSHAL FOR THE SOUTHERN DISTRICT OF NEW YORK, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 9-17) is reported at 325 F. 2d 562. The opinion of the district court (Pet. 18-29) is reported at 215 F. Supp. 953.

JURISDICTION

The judgment of the court of appeals was entered on December 30, 1963. The petition for a writ of

certiorari was filed on February 4, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner should be released from custody in extradition proceedings on the ground that the complaint upon which his initial arrest was based as inadequate, where formal documents setting forth probable cause were subsequently filed by the demanding country.

2. Whether evidence tending to prove an alibi was properly excluded at the hearing.

STATUTES AND TREATY PROVISION INVOLVED

18 U.S.C. 3184 provides as follows:

> Whenever there is a treaty or convention for extradition between the United States and any foreign government, any justice or judge of the United States, or any commissioner authorized so to do by a court of the United States, or any judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within his jurisdiction with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or commissioner, to the end that the evidence of criminality may be heard and considered. If, on such hearing, he deems the evidence sufficient to sustain the charge

under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made.

18 U.S.C. 3190 provides as follows:

Depositions, warrants, or other papers or copies thereof offered in evidence upon the hearing of any extradition case shall be received and admitted as evidence on such hearing for all the purposes of such hearing if they shall be properly and legally authenticated so as to entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused party shall have escaped, and the certificate of the principal diplomatic or consular officer of the United States resident in such foreign country shall be proof that the same, so offered, are authenticated in the manner required.

Article III of the Treaty with the United States of Mexico and Extradition, February 22, 1899, 31 Stat. 1818, provides pertinently:

Extradition shall not take place in any of the following cases:

1. When the evidence of criminality presented by the demanding party would not justify, ac-

cording to the laws of the place where the fugitive or person so charged shall be found, his or her apprehension and commitment for trial, if the crime or offense had been there committed.

* * * *

Article X of said treaty provides as follows:

On being informed by telegraph or otherwise, through the diplomatic channel, that a warrant has been issued by competent authority for the arrest of a fugitive criminal charged with any of the crimes enumerated in the foregoing articles of this treaty, and on being assured from the same source that a requisition for the surrender of such criminal is about to be made accompanied by such warrant and duly authenticated depositions or copies thereof in support of the charge, each government shall endeavor to procure the provisional arrest of such criminal and to keep him in safe custody for such time as may be practicable, not exceeding forty days, to await the production of the documents upon which the claim for extradition is founded.

STATEMENT

1. On October 3, 1962, extradition proceedings were initiated at the request of the United Mexican States, pursuant to treaty between Mexico and the United States. The Assistant United States Attorney for the Southern District of New York filed a complaint charging that petitioner had committed the crime of murder within the United Mexican States (R. 3).[1] A warrant of arrest was issued pursuant to

[1] "R." refers to the record filed by petitioner, consisting solely of the opinion of District Judge Noonan; "Tr." refers

18 U.S.C. 3184, and a detainer was placed against petitioner who was then incarcerated in a New York City jail on unrelated charges. On October 5, petitioner was released to federal authorities and arraigned before the United States Commissioner (R. 3). On or about October 21, the duly authenticated papers for the extradition of petitioner and one Earl Scott, with English translation, were filed. The extradition hearing was adjourned, at petitioner's request, until December 3 (Tr. 1-8). It was held on that day and was thereafter continued on later dates at petitioner's request (Tr. 7-9, 128, 141-141a).

2. At the hearing, the documents submitted by the Mexican authorities were introduced in evidence. Charged with the murder of Louis M. Vidal, Jr., of New York City, were petitioner, an American citizen, two others—Kaplan and Scott—and a Mexican named deGaray. The statements and depositions tended to show that some weeks before November 1961 Kaplan had told deGaray that he intended to come to Mexico with Vidal, who was his partner in a business venture and who, according to Kaplan, was

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to the typewritten transcript of the hearing before the United States Commissioner lodged by the government, which relates largely to the evidence offered on behalf of petitioner. The Commissioner based his finding of probable cause to hold petition upon a voluminous record of documents furnished by the Mexican government, which at present are in the custody of the Secretary of State. In view of the fact that petitioner does not here question the sufficiency of the evidence to establish such probable cause nor the accuracy of the summaries of such evidence by the district court and the court of appeals, our statement herein is based largely upon said opinions.

a very dangerous individual with whom he had had serious differences in the past (Pet. 14). On November 9, Kaplan, petitioner and Scott arrived at Mexico City from San Antonio and took rooms at the El Diplomatico Hotel. Vidal arrived in Mexico City from New York on November 11 and was taken to the Continental Hilton Hotel. Later that afternoon deGaray, pursuant to a previous request by Kaplan, brought him a 1953 Buick which he had borrowed (Pet. 13-14).

Kaplan's statement to the police recounted that he, petitioner and Scott picked up Vidal at his hotel that evening in the Buick. Kaplan dropped off at a bar. Petitioner and Scott returned about 3:00 a.m. and told Kaplan that "Vidal had not fulfilled his part of the deal and Scott had killed him." Scott was armed with a .38 caliber revolver. Kaplan let petitioner and Scott off at their hotel and called deGaray, telling him that Scott had killed Vidal (Pet. 16). DeGaray's version was that Kaplan told him that the Buick had broken down and that he should pick it up that morning; that when deGaray arrived to do so, he found bullet holes in the window and blood stains on the front seat and door; and that when he later asked Kaplan about the blood stains, Kaplan said it was not possible, that he had washed them off himself (Pet. 14-15).

It also appeared that Kaplan, Scott and petitioner had been in and out of their hotel rooms during the course of the night and seemed to be nervous and high-strung. The following night, Vidal was checked out of his hotel by Kaplan and his belongings were

placed in a Corvair. Two days later, a Corvair was found parked illegally at the airport. Within it was a valise containing Vidal's clothing. Petitioner, who had rented the Corvair, came to the rental agency later in the day. Petitioner expressed surprise that the car had been found at the airport, saying he had left it at his hotel. He had the key, paid the rental and asked whether anything was found in the car, to which he received a negative response. He appeared nervous and troubled (Pet. 15).

On November 18, two highway patrolmen saw blood-stained men's clothing by the side of the Mexico-Acapulco highway. Personal effects indicated they belonged to Louis M. Vidal, Jr., of New York City. Together with these was a key to Vidal's room at the Continental Hilton Hotel. On November 22, other officers found a corpse buried by the side of the road three kilometers from the place where the clothing was found. It was identified by Mrs. Teresa Vidal as the body of her husband, Louis M. Vidal, Jr. There were four bullet wounds in the head and neck (Pet. 13). A cartridge clip for .38 caliber bullets was later found by police on the floor of the Buick (Pet. 16).

Thus, the indications of petitioner's guilt were his demeanor after the crime, his association with the deceased during the critical hours, his control of the vehicle in which the victim was apparently killed, and petitioner's admitted knowledge of the murder (albeit he accused an associate).

3. Petitioner raises as an issue the exclusion of evidence which he offered at the hearing. Petitioner's counsel stated that he was prepared to produce

Eastern Airline tickets in the name of petitioner on the 12:05 a.m. flight from San Antonio for November 15, 1961 (the destination of the flight was not stated) and the passenger manifest for Braniff Airlines from Mexico City to San Antonio on November 14, 1961, at 3:45 p.m. These were objected to on the ground that they were hearsay and inadmissible under 18 U.S.C. 3190 (Tr. 16-22), and were excluded (Tr. 143).

Homer E. Cobe, whose business was "consultant, and finder and public relations", stated that he met Vidal on a previous occasion and thereafter conversed with him over the telephone some six or eight times. (Tr. 23-24). On November 14, 1961, about 5:30 p.m., he received a call from Vidal, who had promised to obtain information for him in Mexico. The call was a request for money, which Cobe was then unable to send him (Tr. 24-25). William R. Sauve, a stock broker, who worked with Cobe, said that he had had occasion to speak some five or six times over the telephone to Vidal. On November 13, 1961, at about 5:30 p.m., Vidal called to talk to Cobe about an oil deal and said he was in Mexico (Tr. 51-54). The commissioner excluded these conversations as in direct contradiction of the proof offered to support extradition to the effect that Vidal was killed on November 12 (Tr. 118).

4. On January 18, 1963, the commissioner rendered his decision, finding, *inter alia*, that a warrant for petitioner's arrest had been issued by the Mexican authorities on December 22, 1961, that the offense with which he was charged was punishable under the laws of Mexico and of the State of New York and

was within the provisions of the treaty with that country, that petitioner was the person named in such warrant and that the evidence was sufficient to establish probable cause that he had committed the offense charged. Petitioner was remanded to the United States Marshal to await the order of the Secretary of State (Tr. 143-146). On January 28, 1963, a writ of habeas corpus was issued by the United States District Court for the Southern District of New York, which was thereafter discharged on April 5, 1963. *United States ex rel. Petrushansky* v. *Marasco*, 215 F. Supp. 953. The court of appeals affirmed (Pet. 9-17).

ARGUMENT

1. Petitioner contends that the commissioner had no jurisdiction over his person, for the reason that the complaint merely alleged that the complainant had been informed through diplomatic channels of the matters set forth and for the further reason that the complaint insufficiently stated the nature of the charge. It was proper for the United States Attorney to file the complaint upon information received through diplomatic channels. *Fernandez* v. *Phillips*, 268 U.S. 311, 312. The treaty provision for temporary detention pending arrival of documentary evidence (see *supra*, p. 4) is plainly a reasonable measure to prevent disappearance of the fugitive in the interim. While the supporting documents are frequently filed with the complaint, it is sufficient if they are filed thereafter. *Yordi* v. *Nolte*, 215 U.S. 227. Petitioner made no objection to the detention while he was thus being held.

In any event, if sufficient ground is shown for detention, defects in the original arrest or commitment are immaterial. *Nishimura Ekiu* v. *United States*, 142 U.S. 651, 662. Cf. *Ex parte Bollman and Swartwout*, 4 Cr. 75, 114, 125. After the hearing, habeas corpus is available only to inquire whether the magistrate had jurisdiction, whether the offense charged is within the treaty and whether the evidence warranted the finding that reasonable ground existed to believe the accused guilty. *Fernandez* v. *Phillips*, 268 U.S. 311, 312.

2. Petitioner's complaint that the commissioner improperly excluded evidence which it is claimed shows that he was out of the country at the time of the commission of the offense is wholly without merit. The evidence offered by Mexico constituted probable cause to believe that Vidal had been murdered on the morning of November 12. Petitioner offered evidence that Vidal made telephone calls to this country after the date of his alleged murder, and that petitioner himself left Mexico on November 14. While it is proper for an accused to produce evidence tending to explain ambiguities or doubtful elements in the *prima facie* case made against him, he is not entitled to contradict the evidence of guilt. *Desmond* v. *Eggers*, 18 F. 2d 503, 505 (C.A. 9). *Hyatt* v. *Corkran*, 188 U.S. 691, and *Mansey* v. *Clough*, 196 U.S. 364, relied upon by petitioner, hold merely that a person is not a fugitive within the meaning of Article IV, section 2, clause 2, of the Constitution of the

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The airplane tickets and manifest, which were offered without supporting testimony, were, in any event, hearsay.

United States where the undisputed evidence shows that he was not within the demanding state at the time of the offense charged. Here there was ample evidence that the offense was committed on November 12 and that petitioner was in Mexico City at that time.

The ultimate issue on an extradition hearing is the same as on a preliminary examination before a committing magistrate, whether there is probable cause to believe that the accused is guilty of the offense charged. *Charlton* v. *Kelly*, 229 U.S. 447, 460; *Collins* v. *Loisel*, 259 U.S. 309, 315-317; *Jimenez* v. *Aristeguieta*, 311 F. 2d 547 (C.A. 5), certiorari denied, 373 U.S. 914. See, also, Article III of the treaty (*supra*, pp. 3-4). A sufficient showing was made in this case.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

HERBERT J. MILLER, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
KIRBY W. PATTERSON,
Attorneys.

MARCH 1964

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 809

UNITED STATES OF AMERICA *ex rel.* EVSEY S. PETRUSHANSKY, alias PETER GREEN, a fugitive from justice of the United Mexican States,

Relator-Appellant,

against

ANTHONY R. MARASCO, United States Marshal for the Southern District of New York,

Respondent-Appellee.

PETITION FOR REHEARING

EDWIN GOLD,
GOLD, LAZAR & COOPER
Attorney for Petitioner.

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Respondent-Appellee.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR REHEARING

Petitioner presents his petition for a rehearing of this Court's order dated March 23, 1964, denying the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit, and in support thereof, respectfully shows:

Grounds for Rehearing

In the petitioner's application for a writ of certiorari, he did not go into a detailed presentation of the facts upon which Commissioner Bishop based his findings of criminality, although such facts are set forth in the opinions below and alluded to in the Respondent's Brief.

The statement of facts set forth in Judge Marshal's decision is an accurate recital and the petitioner hereby incorporates them by reference into this petition for rehearing.

The petitioner has just received from Mexico an affidavit dated April 2, 1964, by Joel David Kaplan, who is presently in custody in that Country, which refutes the sole incriminating portion of the record submitted to Commissioner Bishop involving this petitioner and must be brought to the attention of this Court. A copy of this affidavit is printed at page 5 herein and the original is attached to copy filed with the court.

In order to determine the full effect of this new affidavit, his prior statement must be set forth.

In his affidavit dated March 30, 1962 Kaplan swore that when the petitioner and one Scott returned to the Hotel where he was staying, they told him "Vidal had not fulfilled his part of the deal and Scott had killed him" (Governments S3, 2, pp. 7-8). Now the affidavit submitted on the instant application, dated April 2, 1964, asserts unequivocally that Kaplan never had any conversation with the petitioner concerning the death of Louis Vidal. He further states that the affidavit was made under circumstances constituting coercion by the Mexican authorities. It was just discovered that a statement was made by Kaplan on March 31st, 1962 before the Court in Coyoacan, Mexico which clearly supports this new evidence. This statement was omitted by the Mexican authorities and was not part of the record before the lower courts.

The Commissioner's opinion as well as the decision of Judge Noonan in the District Court (Pet., p. 27) and of Judge Marshal in the Circuit Court (Pet., p. 16), had as its very basis for finding this petitioner extraditable, the affidavit of Kaplan, which implicated the petitioner and which is now rendered impotent. This recantation devastates any theory attempting to tie this petitioner to the alleged murder of Louis Vidal.

This new evidence must be viewed in the light of the Mexican authorities laboratory tests made of the alleged instrument of homicide, a Buick automobile, which verifies that the blood scrapings taken from the Buick were from twelve to fifteen days old at the time the report was made. The report was made and attested to on December 2, 1961. Thus the earliest the blood could have been in the Buick was on November 17, 1961 when the petitioner was admittedly out of Mexico for at least three days.

To further support the petitioner's position, a laboratory report prepared by the same authorities revealed that the dirt found in and about the Buick was a different color from the dirt found in the vicinity of the grave.

When we take this unimpeachable scientific evidence and Kaplan's recantation along with the testimony of the two witnesses that testified they had spoken to the deceased at a time when petitioner was not within the confines of Mexico and subsequent to the purported date of the alleged murder, it is submitted that there is now not one scintilla of competent legal evidence which could establish probable cause to believe that the petitioner was guilty of any crime of murder.

It is respectfully submitted that the Mexican authorities are proceeding on a theory that petitioner may have some information concerning the murder of Vidal and are using this proceeding to bring an innocent American citizen into their jurisdiction in order to subject him to an inquisition.

The Supreme Court has always been zealous in protecting the constitutional rights and civil liberties of our countrymen. This Court should be loath to permit the extradition out of this Country of an American citizen under these circumstances, without further proceedings by the Commissioner.

The conclusions drawn in the Respondent's Brief (Res. p. 7) concerning their analysis of petitioner's guilt, are completely dispelled in view of the foregoing.

The submission of this new evidence in the present posture of this case, which has not previously been presented or urged, constitutes intervening circumstances of such substantial and controlling effect as to be within the purview and contemplation of Rule 58 and would warrant this Court to grant this petition for a rehearing.

CONCLUSION

For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted, and that, upon further consideration, writ of certiorari issue to the United States Court of Appeals for the Second Circuit.

EDWIN GOLD,
GOLD, LAZAR & COOPER,
Attorney for Petitioner.

I, EDWIN GOLD, counsel for the above-named petitioner, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Rule 58, subdivision 2 of the Rules of this Court.

EDWIN GOLD,
Counsel for Petitioner.

APPENDIX

Affidavit of Joel Kaplan.

I, JOEL KAPLAN, being duly sworn, deposes and says:

That the statement signed by me for the Mexican authorities on March 30, 1962 wherein I said that Mr. Yevsie Petrushansky came into my room at the Hotel El Diplomatico and stated to me that Mr. Scott shot Louis M. Vidal was false.

I never had a conversation with Mr. Petrushansky concerning the alleged death of Louis M. Vidal.

The reason that I signed the above mentioned statement was because of the fact I was kept without sleep for many days and was continuously questioned by the authorities during this time, further there was a language barrier and the statement was not taken verbatim, all of which caused me to sign an instrument that was prepared by the authorities.

This present statement is consistant with the statement made by me before the Court in Coyoacan on the 31st day of March, 1962 and was the truth then and is the truth now.

Dated: Mexico City, Mexico D.F.
April 2, 1964.

JOEL KAPLAN.

I, Victor Velesquez, State that I was present when Joel Kaplan, whose signature is known to me, signed and executed the above statement.

Lic. VICTOR VELESQUEZ.